ADVISORY ETHICS OPINION 91-03

SYNOPSIS:

(A) Upon request of the client an attorney may not refuse to deliver to the client the papers and property of the client, to which the client is entitled.

(B) An attorney may not collect an excessive fee.

(C) It is beyond the authority of this committee to answer questions of law related to the scope of the attorney's lien and enforceability of retainer agreements.

FACTS:

Counsel to Attorney X requests our opinion with respect to attorney's liens on papers and files of a former client. A client retains Attorney X in a personal injury matter. A "standard" retainer agreement is signed by the client. The retainer agreement contemplates a fee calculated as a percentage of the ultimate recovery .The client terminates his/her relationship with Attorney X and retains Attorney Y prior to the negotiation of any settlement or the filing of suit on behalf of the client by Attorney X. Attorney Y requests that Attorney X deliver the client's file to Attorney Y and offers to pay Attorney X a fee based on the time devoted to the case by Attorney X until dismissal.

QUESTIONS PRESENTED:

(A) What obligation does Attorney X have to give Attorney Y work product produced by Attorney X?

(B) May Attorney X claim the fee specified in the retainer agreement notwithstanding the termination of the attorney-client relationship by the client?

(C) Whether Attorney X violates the Code of Professional Responsibility if Attorney X defers his withdrawal and delivery of the client's file until there is a response to Attorney X's request for payment?

ETHICAL CONSIDERATIONS:

The Disciplinary Rules Applicable to the questions presented are as follows:

DR 2-106 Fees for Legal Services

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

. . .

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

. . .

(6) The nature and length of the professional relationship with the client.

. . .

(8) Whether the fee is fixed or contingent

DR 2-107 Division of Fees Among Lawyers

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services per- formed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

DR 2-110 Withdrawal From Employment

(A) In General.

. . .

(2) In any event a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . ., delivering to the client all papers and property to which the client is entitled. . . .

. . .

(B) Mandatory Withdrawal. A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

. . .

(4) He is discharged by his client.

DR 9-102 Preserving Identity of Funds and Property of a Client

. . .

(B)A lawyer shall:

. . .

(4) Promptly payor deliver to the client as requested by a client the funds, securities, or other properties in possession of the lawyer which the client is entitled to receive.

DISCUSSION:

We will answer only part of the first question presented. An attorney must turn over to the client or former client, on request, all property which the attorney has in his/her possession which the client is entitled to receive. The Code of Professional Responsibility does not define what specific property (other than money and securities) the client is entitled to have. This committee will not undertake to define what property a client is entitled to have. We note that the American Bar Association has discussed the scope of the attorney's obligation to turn over the papers of the client in an Informal Opinion. In Informal Opinion 1376, the committee determined that an attorney must return: (1) all of the property delivered to the attorney by the attorney's client, (2) the "end product" of the attorney's work; and (3) all other material which is useful to the client in fully benefiting from the services of the attorney. In the same opinion, the Committee expressed its view that an attorney need not deliver the attorney's internal notes generated primarily for the attorney's benefit in working on the client's problem.

The question regarding the existence of a lien on the recovery[1] and the right to collect the fee described in the retainer agreement is a question of contract law and not strictly a question of ethical conduct. Answering questions related to potential contract disputes is beyond the authority of this committee. There is, however an ethical component to the second question presented to which this committee can respond. The facts presented in the request letter lack detail and therefore we can give only general guidance on the-question of collecting the fee specified in the retainer agreement.

Based on the statements in the request letter, we assume Attorney X seeks to collect a fee greater than a fee calculated by reference to Attorney X's hourly rate and the hours devoted and closer to the fee specified in the retainer agreement, which appears to be a contingency fee. The request letter also indicates that no settlement was negotiated and no suit was filed by Attorney X. Attorney X has not procured a recovery for the client. The request letter suggests that Attorney Y will pursue the case on the client's behalf and will procure any recovery to which the client is entitled. Attorney Y will undoubtedly expect payment for his/her services also. There are two issues. The first is whether the payment of the full fee contemplated by the retainer agreement would constitute collecting a "clearly excessive" fee. The second is whether the payment of a fee for the handling of a single case to two attorneys not working in the same firm constitutes fee splitting. An attorney may not collect an excessive fee for work per- formed for a client. Factors applicable to a determination of whether a fee is excessive are set out in DR 2-106 (B) which is reproduced above. The collection of the full fee by Attorney X, after Attorney Y procured the recovery would suggest the fee paid to Attorney X is excessive particularly under criteria (1) and (6) of DR 2-106.

Assuming Attorney Y is also working on a contingency fee basis, Attorney X and Attorney Y may not split the fee collected by Attorney Y without the client's consent after full disclosure and without satisfying the remainder of the requirements of DR 2-107. In light of the client's dismissal of Attorney X, and the retaining of Attorney Y, it seems unlikely that the client would give an informed and voluntary consent to a splitting of the fee between Attorney X and Attorney Y based on the criteria of DR 2-107. A consent obtained by the threat of withholding the client's file can hardly be said to satisfy the requirements of DR 2-107.

The first part of the third question is easily answered. Attorney X may not defer his withdrawal from the matter after being discharged by his client for any reason, other than avoiding withholding of approval by the tribunal before which the case is

[1] See e.g. *Estate of Button v. Anderson, et al.,* 112 VT 531 (1942)

pending or otherwise foreseeable prejudice to the client. An attorney must deliver the property of his/her client to the client when the client requests it. Under DR 2-110 (A)(2) an attorney may not act in a way which prejudices the client in withdrawing from representing the client. If delaying the delivery of the papers and property which the client is entitled to have would prejudice the client in any way, Attorney X may not withhold the papers and property to which the client is entitled.

The common law in effect in Vermont recognizes the existence of an attorney's lien on the "money and papers of the client in the hands of the attorney." The lien may be created in one of two ways. A lien may be created on a fund of money expressly or by implication in a fee agreement.[2] The lien may also arise from common law.[3] The Note in the *Walker* case contains a description of the attorney's retaining and charging lien. The application and scope of the attorney's lien is a matter of law and is not a proper subject for determination by this Committee. There are, however, ethical considerations which may affect the claim of or enforcement of the attorney's lien.

In Opinion 82-9, this committee discussed the apparent conflict between the common law which clearly permits an attorney to retain the money and papers of his/her client as security for the payment of fees that are due and the applicable disciplinary rules and ethical considerations discussed above. The committee balanced the attorney's obligation to avoid prejudice to the client against the attorney's right to a reasonable fee.[4] In Opinion 82-9 the committee reasoned that access to the client's papers would be a prerequisite to competent representation by a lawyer new to the case. The committee determined that the attorney must subordinate his/her lien and deliver the papers to which the client is entitled, to the client, if retaining the papers would prejudice the client in pursuing his/her case.

In construing the applicable provisions of the Model Code of Professional Conduct, the American Bar Association Committee considered a similar fact situation. The ABA Committee also recognized the existence of the attorney's lien but noted that "(m)ere existence of a legal right (to assert the lien) does not entitle the attorney to stand on the lien if ethical considerations require that he/she forgo it."[5] The ABA Opinion also presents some hypotheticals about when it is appropriate to assert the lien.

We note in passing that in other states, the attorney claiming the lien was entitled to an alternate form of security for the fee due. See, Decision of the Indianapolis Bar Association Legal Ethics Committee, Volume 6, #25, January 16, 1991, as cited in the *ABA/BNA* Lawyer's Manual On Professional Conduct at Page 440.

The committee finds no reason to revise the conclusion of Opinion 82-9 at this time.

[2] See, *Estate of Button v. Anderson, et al.,* 112 Vt. 531 (1942).
[3] *Hutchinson v. Howard,* 15 Vt. 544 (1843); *Walker v. Sargeant,* 14 Vt. 247 (1842).
[4] EC 2-16 and 2-17
[5] ABA Informal Opinion 1461.